

SERVED: August 11, 1998

NTSB Order No. EA-4684

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of July, 1998

Application of)

THEODORE JOSEPH STEWART)

for an award of attorney fees)
and related expenses under the)
Equal Access to Justice Act)
(EAJA).)

Docket 237-EAJA-SE-14540

OPINION AND ORDER

The applicant appeals from the initial decision of Administrative Law Judge William A. Pope, II, issued on September 25, 1997, denying his application for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, which requires the government to pay to a prevailing party certain attorney fees and expenses, unless the government establishes that its position was substantially justified.¹ As discussed below, we deny the appeal.

¹A copy of the law judge's decision is attached, wherein the background of the case is discussed in considerable detail.

On June 26, 1996, the Administrator issued an amended emergency order (complaint), revoking applicant's airman certificates, including his Airline Transport Pilot (ATP) certificate, for violations of sections 61.59(a)(1) and (2) of the Federal Aviation Regulations (FARs). The Administrator alleged that applicant falsified documents and accepted an ATP type rating in a Grumman TBM aircraft (a vintage World War II carrier-based aircraft), all the while knowing that he was not qualified for that rating because he had not received the appropriate flight check. More specifically, it was alleged that the TBM did not have a glide slope installed and, therefore, applicant could not have sufficiently demonstrated an ILS approach, as required for an ATP rating. The Administrator further alleged that the aircraft did not have dual controls and that the examiner could not observe the instrument panel from his seat. The complaint also charged that, in 1979, applicant submitted false information for the purpose of obtaining a Flight Instructor Certificate with Multiengine Rating and, in the course of taking an examination for an ATP certificate, presented a logbook containing false information.²

After an eight-day hearing, the law judge determined that the charge related to the TBM aircraft had not been proven. He found that it was reduced to a credibility decision -- applicant and three witnesses testified that a Narco Nav 122 radio with a

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²The complaint is reproduced in the law judge's decision at

glide slope, had been temporarily installed in the aircraft for the flight check but that no maintenance entries had been made in the log, while the Administrator argued that, since there were no maintenance entries in the log, the unit, with all probability, was never installed. The law judge also found that the applicant had intentionally misrepresented his flight time when applying for his ATP and flight instructor certificates in May 1979. In deciding cross appeals, the Board affirmed the law judge's dismissal of the TBM charge, and reversed the finding related to the 1979 charge, thus dismissing the entire revocation order. Administrator v. Stewart, NTSB Order No. EA-4479 (1996).

Applicant claims that he is entitled to an award of attorney fees and expenses, at a minimum, for prevailing on the TBM issue (which he asserts took 90% of the time in preparation and at trial), as the Administrator was not substantially justified in bringing and pursuing this action. The law judge denied the EAJA application, finding that the Administrator had substantial justification and sufficient evidence to pursue both charges at each step of the proceeding.

"To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, *i.e.*, the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." Application of U.S. Jet, NTSB Order No. EA-3817 at 2 (1993); Pierce v. Underwood, 487 U.S. 552, 565,

108 S.Ct. 2541 (1988). The FAA may still be found to have asserted a position that was substantially justified even though the agency did not prevail on the merits. Administrator v. Conahan, NTSB Order No. EA-4276 at 4 (1994); U.S. Jet at 3.

Regarding the TBM issue, applicant argues that the case did not hinge on a credibility assessment, but rather was the product of the FAA choosing to disbelieve exculpatory witnesses and failing to fully investigate or follow up on leads, and was not supported by sufficient evidence. The law judge, however, found that the evidence clearly showed that the TBM aircraft is a single pilot Navy torpedo bomber with one set of controls and instruments. The crewman seat, located behind the pilot, has only a socket for installation of an auxiliary control stick which, if installed, could only control pitch and roll. Anyone seated there would have, at best, an extremely limited view of the pilot compartment and instrument panel. He also noted, and we agree, that the issue of whether or not the aircraft had a temporary glide slope during the check ride was linked to the credibility of the witnesses.³ He determined the Administrator was substantially justified in proceeding to hearing on the matter: There were no maintenance entries for the glide slope

³See Conahan v. Administrator, NTSB Order No. EA-4276 at 8 (1994), an EAJA case where we found that the Administrator was substantially justified in pursuing the case in order that appropriate credibility determinations could be made. We went on to state that, "when key factual issues hinge on witness credibility, ... the Administrator is substantially justified -- absent some additional dispositive evidence -- in proceeding to a hearing where credibility judgments can be made...."

installation; the unit offered as the one installed at the time of the check ride was found to have actually been installed in another aircraft at the time of the check ride;⁴ and there was no evidence, other than witness testimony, that a temporary ILS was installed. The law judge also noted that the Administrator was substantially justified in trying to show that the applicant knew the aircraft was not an appropriate one for an ATP check ride. With these conclusions we cannot differ.⁵

As for the 1979 charge, applicant admits that the hours recorded in his application and logbook were incorrect,⁶ but argues that this 17-year-old charge could have been handled on a non-emergency basis and the institution of two emergency cases with little or no basis in two years against him are illustrative of the Administrator's bad faith.⁷

⁴The law judge determined that, if not the ILS unit that was presented at hearing, then a similar unit was installed in the TBM at the time of the check ride.

⁵The applicant also asserts that the Administrator undertook this investigation in bad faith and turned it into a protracted "witch-hunt." Since, however, we have found that the position of the Administrator was substantially justified and reasonable in both law and fact, the motivation of prosecution is not an issue which we need explore. To the extent that it is relevant, it goes to witness credibility, which has already been considered by the law judge and reviewed by the Board. We also note that the Board will not review the Administrator's exercise of prosecutorial discretion. Administrator v. Bailey and Avila, NTSB Order No. EA-4294 at 11 (1994); Administrator v. Rigsby, NTSB Order No. EA-3860 at 4 (1993).

⁶He admitted that the nearly 1500-hour increase in flight time logged in a two-month period could not have been accurate.

⁷See Administrator v. Stewart, NTSB Order No. EA-4387 (1995).

Applicant acknowledges that the Board is not authorized to review the Administrator's exercise of emergency authority, yet claims that the Board should take it into account, given the "egregious and unwarranted conduct of the FAA." Applicant's brief at 18. It is not the Board's function, however, to review the Administrator's use of emergency authority. Administrator v. Borregard, NTSB Order No. EA-3863 at 5 (1993), aff'd, 46 F.3d 944 (9th Cir. 1995). Hence, the exercise of that authority may not factor into our decision.

As to the falsification charge based on the 1979 applications, the evidence was clearly sufficient to justify a prosecution, notwithstanding our subsequent reversal of its use in assessing the applicant's current nontechnical qualifications to hold a certificate. As the law judge pointed out, the misstatements were on an application for a flight instructor's certificate and in a logbook presented in the course of taking an examination for an ATP rating, documents on which significant reliance is placed for the acquisition of those certificates/ratings.⁸ Applicant's argument that the overstated

⁸What's more, intent to falsify may be inferred from circumstantial evidence. See Administrator v. Krings, NTSB Order No. EA-3908 at 5, n.7 (1993), citing, among others, Erickson v. NTSB, 758 F.2d 285 (8th Cir. 1985).

While we took all that into account in the appeal on the merits, we nevertheless believed that, given all the circumstances, dismissal of the 1979 charge was warranted:

We appreciate, and our procedural rules recognize, that the Administrator should have the discretion, in the interest of air safety, to pursue even stale charges that implicate airman qualifications. We

hours were not integral to the certificate/rating he had pursued and should have alerted the Administrator that revocation was not necessary is unavailing. Board precedent is established that regulations prohibiting falsification apply to logbook (and other) entries that are or may be used to show that an airman has complied with requirements for a certificate or rating.

Administrator v. Lee, Hill, and Bergen, NTSB Order No. EA-4260 at 6 (1994), citing Administrator v. Turner, NTSB Order No. EA-3748 at 3, n.5 (1992). It has long been the rule that "reliability and accuracy of aircraft and pilot records are vital to aviation safety." Borregard, NTSB Order No. EA-3863 at 6, n.5, and cases cited therein. As for sanction, revocation is usually affirmed by the Board where charges of falsification have been sustained, as it calls into question an airman's qualifications. See, e.g., Administrator v. Cassis, 4 NTSB 555, 557 (1982), aff'd, 737 F.2d 545 (1984). The Administrator's position was thus reasonable in both law and fact under the EAJA standard as applied by then-existing Board precedent.⁹

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nevertheless believe that judgments concerning qualifications that certain conduct would ordinarily warrant become less and less justifiable as the interval between the conduct and the prosecution for it increases. While we do not believe it necessary in this proceeding to attempt to determine the maximum interval we would accept as consistent with a proper concern for contemporaneity, we are satisfied that the limit has been exceeded here.

Administrator v. Stewart, NTSB Order No. EA-4479 at 7-8.

⁹As the law judge recognized, the Administrator could not have anticipated the Board's decision would depart from

ACCORDINGLY, IT IS ORDERED THAT:

The applicant's appeal from the law judge's denial of his application for fees and expenses under the EAJA is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.